Choong Mee Leng v Lam Chong Seng

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–650 OF 2002
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ARIFIN JAKA JJCA
1 JUNE 2005

Civil Procedure — Summary judgment — Declaration — Whether High Court has power to grant declaration that contract is subsisting under O 81 of Rules of the High Court 1980

The respondent brought an action against the appellant to enforce a contract. At the foot of his writ he claimed a declaration, a decree of specific performance, damages and other relief. He then took out a summons for judgment under O 81 of the Rules of the High Court 1980. The registrar before whom the summons came at first instance dismissed it. The respondent then appealed to the judge in chambers who allowed the appeal. The learned judge then proceeded to enter judgment summarily for a declaration, specific performance, damages, including exemplary damages and costs on a solicitor-client basis. The appellant appealed against the learned judge's order.

Held, allowing the appeal with costs, setting aside the High Court's orders and granted the appellant unconditional leave to defend:

Order 18 is jurisdictional in nature. But for the rule the court has no jurisdiction to enter summary judgment in the case set out therein. It is to be noticed that O 81 does not include the declaratory decree among the relief that may be granted summarily. Order 18 does not empower a court to include a declaration that a contract is subsisting. It follows that the court has no power to enter summary judgment either under procedure prescribed by O 14 or O 81 save in a case expressly provided for in either of these rules of court (see para 4). Here the respondent had obtained a declaration under O 81 when that form of relief is not one of the remedies available summarily under the Order. The High Court was plainly wrong in making the order which it did as it simply did not have the power to do so (see para 5).

[**Bahasa Malaysia summary**

Responden telah membawa satu tindakan terhadap perayu untuk menguatkuasakan satu kontrak. Pada dasar writ beliau, beliau telah menuntut untuk satu deklarasi, dekri untuk pelaksanaan spesifik, ganti rugi dan relif-relif yang lain. Beliau kemudiannya mengeluarkan satu saman untuk penghakiman di bawah A 81 Kaedah-Kaedah Mahkamah Tinggi 1980. Pendaftar yang telah mendengar saman itu pada mulanya telah menolak saman itu. Responden kemudiannya telah merayu kepada hakim dalam kamar yang membenarkan rayuan itu. Hakim yang arif seterusnya memerintahkan satu penghakiman terus untuk deklarasi, dekri untuk pelaksanaan spesifik, ganti rugi termasuk ganti rugi teladan dan kos berdasarkan hubungan peguamcara-anakguam. Perayu merayu terhadap perintah hakim yang arif.

Diputuskan, membenarkan rayuan itu dengan kos, menolak keputusan Mahkamah Tinggi dan memberi perayu kebenaran tanpa syarat untuk membela:

Aturan 18 adalah satu peruntukan bidang kuasa. Tanpa peruntukan ini, mahkamah tidak ada bidang kuasa untuk memberi penghakiman terus dalam sebarang kes. Adalah patut diambil kira bahawa A 81 tidak termasuk dekri deklarasi di antara relif-relif yang boleh diberi secara terus. Aturan 18 tidak memberi kuasa kepada mahkamah untuk memasukkan satu deklarasi yang tidak pada mulanya wujud dalam kontrak itu. Tambahan pula, mahkamah tiada kuasa untuk memasukkan penghakiman terus dalam prosedur yang dinyatakan oleh A 14 atau A 81 kecuali dalam kes yang telah dinyatakan dalam mana-mana peruntukan ini (lihat perenggan 4). Di sini responden telah mendapat satu deklarasi di bawah A 81 di mana relif bukan satu remedi sedia ada secara terus di bawah Aturan itu. Mahkamah Tinggi ternyata salah dalam memutuskan perintah itu kerana tidak mempunyai kuasa untuk memerintah demikian (lihat perenggan 5).]

Notes

For cases on summary judgment generally, see 2(2) Mallal's Digest (4th Ed, 2004 Reissue) paras 2648–3309.

Cases referred to

CE Heath Plc v Ceram Holding Co [1988] 1 WLR 1219 (refd)
Cotra Enterprises Sdn Bhd v Pakatan Mawar (M) Sdn Bhd [2001] MLJU 358 (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, 81
Rules of the Supreme Court 1997 [Eng]

Appeal from: Writ of Summons No S6–22–283 of 2003 (High Court, Kuala Lumpur)

SK Sivam (PG Lim & Co) for the appellant.
CS Lam (KC Chan with him) (CS Lam & Co) for the respondent.

Gopal Sri Ram (delivering judgment of the court):

[1] This is a simple case. It merely involves a point of practice and procedure. It has to do with the propriety of the order for summary judgment entered by the learned judge of the High Court. We heard this appeal on 12 and 13 May 2004 and at the conclusion of arguments allowed the appeal with costs here and below, set aside the High Court's orders and granted the appellant unconditional leave to defend. We also remitted the suit to the High Court to be mentioned before the judge in chambers on 31 May 2004 for the purpose of fixing a date for the grant of directions in case management, including the fixing of a date for the hearing and disposal of the action on its merits. The respondent

has since applied for leave to appeal to the Federal Court and hence the necessity for this judgment. The narrative relevant to this case is as follows.

[2] The respondent's case in the court below is that he had entered into a valid and binding contract with the appellant to purchase the latter's single storeyed link house which contract the appellant had refused to specifically implement. The respondent brought an action against the appellant to enforce the alleged agreement. At the foot of his writ he claimed a declaration, a decree of specific performance, damages and other relief. He then took out a summons for judgment under O 81. The registrar before whom the summons came at first instance dismissed it. The respondent then appealed to the judge in chambers who allowed the appeal. The learned judge then proceeded to enter judgment summarily for a declaration, specific performance, damages, including exemplary damages and costs on a solicitor client basis. The appellant then appealed to us against the learned judge's order.

[3] Before us the only point taken up and argued by both sides was whether the learned judge had jurisdiction under O 81 to enter judgment in the terms he did. Now, O 81 provides as follows:

(1) In any action begun by writ indorsed with a claim:

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or

(b) for rescission of such an agreement; or

(c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the court for judgment.

(2) An application may be made against a defendant under this rule whether or not he has entered an appearance in the action.

[4] It is not open to argument that the foregoing rule of court is jurisdictional in nature. But for the rule the court has no jurisdiction to enter summary judgment in the cases set out therein. It is to be noticed that O 81 does not include the declaratory decree among the relief that may be granted summarily. Compare this with the English RSC 1997 which empowers an English court to summarily grant a declaration that a contract is at an end. But neither the English rule of court nor ours empowers a court to include a declaration that a contract is subsisting. It follows that the court has no power to enter summary judgment either under procedure prescribed by O 14 or O 81 save in a case expressly provided for in either of these rules of court.

[5] In *Cotra Enterprises Sdn Bhd v Pakatan Mawar (M) Sdn Bhd* [2001] MLJU 358, Ahmad Maarof JC had before him a case in which the plaintiff had sought summary judgment under O 14 for a declaration the substance of which was that five written agreements he had entered into were void and had been rescinded.

The learned judicial commissioner held — and in our judgment correctly held — that the declaration sought was in essence an order for rescission within O 81 and therefore fell outside the scope of O 14. In the present case the facts are inverted. Here the respondent obtained a declaration under O 81 when that form of relief is not one of the remedies available summarily under the Order. It is our very respectful view that the High Court was plainly wrong in making the order which it did as it simply did not have the power to do so.

[6] In *CE Heath Plc v Ceram Holding Co* [1988] 1 WLR 1219, Neill LJ made the following observation:

> The scope of O 14 proceedings has been a matter which has been determined by the rules. There would therefore appear to be little, if any, room for an argument that the court has some wider powers in these fields than that conferred by the rules, or that it has some residual or inherent jurisdiction to grant relief where it is just to do so, or that the wide language of the statute confers some additional powers to act outside and beyond the rules.

[7] That passage in our respectful judgment applies to the summary procedure created by RHC O 81.

[8] When we put the jurisdictional point to learned counsel for the respondent when this appeal came up before us for argument on 12 May 2004, both MrLam and Mr Chan said that they were taken by surprise as the matter had not been raised in the court below and asked for the matter to be adjourned to the next day to enable them to turn up the authorities. When the matter was called on for continued argument on 13 May 2004, neither Mr Lam nor Mr Chan was able to assist us in any way. We then proceeded to allow the appeal and to set aside the orders of the High Court. We also made the orders referred to in para 1 of this judgment.

[9] A word about costs. We were initially inclined to deprive the appellant of his costs. We thought that although it was open for the appellant to take the jurisdictional point at the appellate stage (see *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9) the respondent had been placed at a distinct disadvantage because the point had been taken ex improviso without any notice having been given to counsel for the respondent. That is certainly the impression we gained from those representing the respondent. However, Mr K Sivam of counsel for the appellant was able to demonstrate quite convincingly that the point had indeed been taken expressly in the appellant's written submission delivered in the court below pursuant to the learned judge's direction made on 2 July 2002. Accordingly we awarded the costs of the appeal and those incurred in the court below to the appellant. The deposit was ordered to be refunded to the appellant.

Appeal allowed.

Reported by Loo Lai Mee